ARTICLE

U.S. UNCONSCIONABILITY AND ARTICLE 1171 OF THE NEW FRENCH CIVIL CODE: ACHIEVING BALANCE IN STATUTORY REGULATION AND JUDICIAL INTERVENTION

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I. OVERVIEW OF ARTICLE 1171 AND ITS ANTECEDENTS IN THE FRENCH CODES

On February 10, 2016, French President François Hollande approved a comprehensive reform of parts of the French Civil Code, including its general principles of contract law in Book III, Title III of the Code. To avoid the gridlock that likely would accompany debate on each provision if drafted by legislators, the French Parliament had earlier authorized the executive branch to prepare and adopt revisions in the form of an ordonnance pursuant to a procedure set forth in article 38 of the French Constitution. The French Ministry of Justice took the lead in preparing the reform, which became effective in October 2016.

The goals of the reform are stated in the legislation authorizing executive lawmaking: to modernize, clarify, reorganize, and simplify the law; to improve the law’s readability; and to make the law more accessible. Although modernization of the iconic 1804 Napoleonic Code might strike some as an exceedingly bold enterprise, Guillaume Meunier, an official in the Ministry of Justice and an active participant in the reform process, responded by asking, “who could understand that, in 2012, a commercial or civilian relationship is ruled by provisions mostly written in 1804?”

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1 Ordonnance 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations [Ordinance 2016-131 of 10 February 2016 to reform the law of contracts, the general regime and the proof of obligations], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 11, 2016, p. 26 [hereinafter Ordonnance].


3 1958 Const. art. 38 (Fr.) (permitting the executive branch to petition the Parliament for permission to enact law by ordinance, which would remain in force for only a limited time unless adopted by Parliament).


5 Ordonnance, supra note 1, art. 9.

6 See Loi, supra note 2, art. 8. Clarity and accessibility of the law are values of constitutional stature in France. See Meunier, supra note 4, at 15.

7 Meunier, supra note 4, at 15.
successful modernization of the code could encourage traders to choose French contract law as the governing law in international transactions.

Regarding the need for clarification of code provisions, Meunier notes that two hundred years of judicial interpretations of the 1804 Code have added substance to the Code's general provisions, but that full meaning cannot be gleaned by reading the Code alone: "Pretending to understand the French law of obligations by reading the 1804 Code is like pretending to sense the taste of a peach by eating its stone."

Consequently, it is not surprising that many of the revisions codify judicial interpretations that had previously added clarity and specificity to general provisions of the 1804 Code. Provisions in the reformed code extending the duty of good faith to the negotiation process, for example, codify existing judicial interpretations. The reform also reflects the

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8 Under an EU regulation commonly known as “Rome I,” courts within the European Union will liberally enforce the parties’ contractual choice of the contract law that will govern any disputes arising out of their contract. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177/6) art. 3. In the United States, the Uniform Commercial Code [hereinafter the UCC in text or U.C.C. in citations] honors party choice of law in sales of goods, but only if the parties have chosen the law of a state or nation with a “reasonable relation” to the transaction. U.C.C. § 1-301 (2001). With some limitations, courts in the U.S. will also honor party choice in non-sales contracts. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS 187 (1988); see also M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8-19 & n.15 (1972) (in the exercise of admiralty jurisdiction, enforcing party choice of forum, and by extension that forum’s law, even though the chosen forum had no relation to the transaction or the parties).

9 Michel S6jean, The French Reform of Contracts: An Opportunity to Tie Together the Community of Civil Lawyers, 76 La. L. Rev. 1151, 1151–54, 1159–61 (2016) (referring to stated goal of the French Ministry, but opining that the Ministry will best increase the influence of the new code through translation into other languages, especially English, and providing rich web resources); Taylor Wessing, French reform of contract law – a first analysis of the impact of the reform on franchise and distribution networks, LEXOLOGY (Feb. 23, 2016), http://www.lexology.com/library/detail.aspx?g=3761eb03-8ba6-4a02-b02f-33ba2b aea2cb (identifying the goal of increasing the attractiveness of French law by updating and simplifying it).

10 Meunier, supra note 4, at 15.

11 See, e.g., Luc Grynbaum, French Civil Code Reform on Contract Law, MENA Bus. L. Rev. 73, 74 (2016) (regarding a line of provisions beginning with art. 1130, stating that “case law has been embodied in the new French texts” on issues of consent); Peter Rosher, French Contract Law Reform, 17 Bus. L. Int’l 59, 72 (2016) (concluding that the reform largely “seeks to codify rules developed by case law over the years”); Wessing, supra note 9 (asserting that “a large majority” of the new provisions in the reform are unsurprising because they codify principles previously established in case law).

12 Rosher, supra note 11, at 69–70 (referring to articles 1103 and 1111 in an early version of the reform, which are articles 1104 and 1112 in the final version).
influence of nonbinding sources of contract rules and principles promulgated in the effort to harmonize European contract law.\textsuperscript{13}

However, two innovations in the reform appear, at least at first glance, to be influenced in part by U.S. law. Article 1195 of the reformed code, for example, introduces a new default rule of commercial impracticability similar to that in U.S. law,\textsuperscript{14} except that it permits a court to revise or terminate the contract if the parties fail to accomplish either of those resolutions by agreement.\textsuperscript{15}

Even more controversial to many observers is new article 1171,\textsuperscript{16} which invites comparisons to the unconscionability doctrine in the United States.\textsuperscript{17} Article 1171 empowers a judge to strike out an unfair term that creates a significant imbalance between the parties, but only in a standard form contract, and only if the imbalance is caused by a term other than the price or other main obligation of a party:

Article 1171. – Any term of a standard form contract which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written.

The assessment of significant imbalance must not concern either the main subject-matter of the contract nor the adequacy of the price in relation to the act of performance.\textsuperscript{18}

\textsuperscript{13} Meunier, supra note 4, at 16; Grynbaum, supra note 11, at 75 (concluding that “this French reform of Contract Law has converged with the evolution seen in European Law”); Séjean, supra note 9, at 1157 (asserting that the reform is influenced by European contract principles to a greater degree than it will be influential internationally).


\textsuperscript{16} See Rosher, supra note 11 (referring to art. 1169 (later renumbered art. 1171) as “one of the most debated changes introduced by the reform”); EBA Endrós-Baum Associés, A necessary yet delicate reform of French contract law, 1, 1 (2015), http://www.eba-avocats.com/wp-content/uploads/2015/05/EN_Note-reforme-du-droit-des-contrats-et-des-obligations.pdf (“This is certainly one of the most debated points of the reform: the fact that the notion of ‘significant imbalance’ is not clearly defined is frightening.”) [hereinafter EBA].

\textsuperscript{17} See U.C.C. § 2-302 (2011); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

\textsuperscript{18} REFORM IN ENGLISH, supra note 15, at 14, art. 1171. The official French text of this provision reads:
The celebrated element of *cause* in the original Code had become the repository for several validity requirements, including a limited judicial mechanism for policing significantly unfair terms. The reform eliminates the concept of *cause*, leaving room for article 1171 and other code provisions to more directly regulate abusive contract terms.

Although the term *cause* may be sufficiently broad and multi-faceted to encompass matters of validity, article 1171 much more clearly and explicitly grants French magistrates the authority to strike out a contractual...
term if it fails a test of fairness. It thus more directly and openly raises questions of whether the effort to modernize the Code, partly by protecting weaker parties, unduly sacrifices values of certainty, individual autonomy, and freedom of contract. If those questions are not answered satisfactorily, article 1171 could undermine the reform’s goal to make French law an attractive option for international transactions.

Still, article 1171 is not entirely unprecedented in French law. The groundwork for article 1171 was laid by other French code provisions that implement European Union directives and, to a modest degree, by amendments to article 1152 of the original Civil Code.

After amendments in 1975 and 1985, article 1152 of the original Civil Code authorized a judge to reduce a manifestly excessive contractual penalty clause or increase a manifestly inadequate liquidated damages clause, on request by a party or on the judge’s own motion. As amended, article 1152

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24 See supra note 18 and accompanying text.
25 Rosher, supra note 11, at 59 (stating that the reform has been “[p]romoted as an opportunity to protect the weaker party”); EBA, supra note 16, at 1 (objective of the reform is to clarify general principles and protect the weaker party).
27 See supra note 9 and accompanying text.
28 See, e.g., Rosher, supra note 11, at 68 (warning that traders began to choose Swiss law after Germany adopted an approach similar to that of article 1169, now article 1171); EBA, supra note 16, at 2 (“Thus, the impossibility of predicting judicial interventions can lead to an ultimate disinterest in French law from an international business-law point of view.”).
29 See, e.g., CHRISTIAN TWIGG-FLESNER, THE EUROPEANISATION OF CONTRACT LAW 10, 19–20 (2d ed. 2013) (summarizing EU lawmaking structures and reviewing EU directives relating to consumer protection and abusive practices between commercial enterprises); Tamas Dezso Ziegler, The Myths We Built Around EU Consumer Law, in HUNGARIAN YEARBOOK OF INTERNATIONAL LAW AND EUROPEAN LAW 2015, at 377–402 (2015), http://ssrn.com/abstract=2678904 (critiquing EU consumer law). Unlike an EU regulation, which imposes a uniform rule on member states, an EU directive fosters general harmonization of national laws by requiring member states to change their laws to meet EU norms, with the details of specific legislation left to each member state. TWIGG-FLESNER, supra, at 29.
30 See Charles R. Calleros, Punitive Damages, Liquidated Damages, and Clauses Pénales in Contract Actions: A Comparative Analysis of the American Common Law and the French Civil Code, 32 Brook. J. Int’l L. 67, 104–08 (2006). Together, the two amendments added the following language: “Néan moins, le juge peut, même d’office, modérer ou augmenter la peine qui avait été convenue, si elle est manifestement excessive ou déraisonnable. Toute stipulation contraire sera réputée non écrite.” C. civ. art. 1152 (Fr., as amended 1985). Professor Crabb translates this passage to read: “Nevertheless, the judge, even on his own motion, may moderate or increase the penalty which had been agreed upon, if it is manifestly excessive or pitiful. Any contrary stipulation will be considered not written.” Crabb Trans., supra note 19, art. 1152. For a broader discussion of article 1152, see infra notes 128–36 and accompanying text. In the newly reformed French Civil Code, the provisions of former article
did not provide a test for assessing whether stipulated damages were "manifestly excessive or pitiful,"\(^3\) and the amendments left the magnitude of any adjustment in damages to the discretion of the judge.\(^3\) Consequently, amended article 1152 represented a significant allocation of authority to the judiciary, but only in the context of two narrow issues regarding stipulated damages.

Somewhat more broadly, article L. 132-1 of the French Consumer Code\(^3\) has declared for more than two decades that ancillary terms\(^3\) of a consumer contract are invalid if they create a significant imbalance between the parties' rights and obligations to the detriment of the consumer.\(^3\) However, regulation under article L. 132-1 has expressly relied on an administratively produced list of presumptively unfair terms.\(^3\) Consequently, article 1171 of 1152 now appear in article 1231-5. This Article, however, retains its reference to article 1152, because it analyzes its evolution prior to the reform.

\(^{31}\) Crabb trans., supra note 19, art. 1152.

\(^{32}\) See Calleros, supra note 30, at 105–08.

\(^{33}\) Effective in July 2016, the French Consumer Code has been reorganized. In the recodification, the equivalent of art. L. 132-1 can be found at CODE DE LA CONSUMMATION [CONSUMER CODE], arts. L212-1, L241-1 (Fr. 2016), https://www.legifrance.gouv.fr/affichCode.do;jsessionid=AECC9692AA2FC0CE6553846CE5C32C17.tpdila07v_1?cidTexte=LEGITEXT000006069565&dateTexte=20160719 [hereinafter C. CONS.]. For purposes of examining the consumer code as an antecedent to new Civil Code art. 1171, however, this Journal Article refers to the codification in force prior to February 2016, and it thus refers to C. CONS. art. L. 132-1 (Fr. 2015).

\(^{34}\) Like article 1171, Consumer Code art. L. 132-1 has regulated only unfair terms other than the price or other main obligation, to the extent that the clauses are written in a clear or understandable manner:

L'appréciation du caractère abusif des clauses au sens du premier alinéa ne porte ni sur la définition de l'objet principal du contrat ni sur l'adéquation du prix ou de la rémunération au bien vendu ou au service offert pour autant que les clauses soient rédigées de façon claire et compréhensible.

C. CONS. art. L. 132-1, ¶ 7 (Fr. 2015).

\(^{35}\) The first paragraph of article L. 132-1 provides:

Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat.


\(^{36}\) The second paragraph of this article provides:

Un décret en Conseil d'Etat, pris après avis de la commission instituée à l'article L. 534-1, détermine une liste de clauses présumées abusives ; en cas de litige concernant un contrat comportant une telle clause, le professionnel doit apporter la preuve du caractère non abusif de la clause litigieuse.
the new Civil Code on its face allocates greater discretion and responsibility to the judiciary than the Consumer Code. 37

A more expansive predecessor to article 1171 is French Commercial Code article L. 442-6, which regulates abusive practices in transactions between professionals. 38 Unlike article L. 132-1 of the Consumer Code, 39 article L. 442-6 does not limit judicial assessment to auxiliary terms. Instead, it authorizes judicial actions 40 to redress the statutorily prohibited action of “subjecting a business partner to obligations that create a significant imbalance in the rights and obligations of the parties,” 41 and it specifically regulates abusive terms relating to the price or a party’s main obligation. Moreover, although a Commission d’examen des pratiques commerciales (CEPC) issues recommendations regarding commercial practices, 43 and though the CEPC has analyzed and summarized previous judicial applications of the significant imbalance standard, 44 it has not provided its own original guidance about this standard.

In light of the expansive judicial intervention authorized by article L. 442-6 of the Commercial Code regarding contracts between professionals, one might wonder why article 1171 of the reform would renew debates about judicially imposed limits on freedom of contract. 45 Part of the answer might

37 See supra notes 16–18 and accompanying text.
39 See supra notes 33–36 and accompanying text.
41 C. COM. art. L. 442-6, I 2° (Fr. 2015).
42 Id. arts. L. 442-6, I 1°, L. 442-6, I 4°. For example, subarticle 1° prohibits a trader from the seeking or securing of an advantage from a business partner that is “manifestly disproportionate to the value of the service provided.” Raworth trans., supra note 38, at 436.
43 See C. COMM. art. L. 440-1 (establishing tasks and rules for the CEPC).
45 See supra note 16.
lie in the view, held by some, that the French Civil Code should stand apart from other codes as a source of general guiding principles. Moreover, two of the general principles reflected in the Civil Code—freedom of contract and limited authority granted to judges—are inevitably compromised by a provision that grants judges authority to strike down unfair contract terms without the administrative guidance established in Consumer Code article L. 132-1 or even the recommendations of the Commission described in Commercial Code article L. 440-1. Viewed in this context, one could predict fresh controversy. The reform apparently took inspiration from detailed provisions of the Consumer and Commercial Codes to fashion a more general tool in the Civil Code for judicial policing of abusive terms.

46 See, e.g., Mustapha Mekki, The General Principles of Contract Law in the "Ordonnance" on the Reform of Contract Law, 76 LA. L. REV. 1193, 1199 (2016) (presenting this view under the heading of "exogenous causes" of concern); see also id. at 1201 ("[T]he Civil Code provides for the general law, a referent, which must include unifying principles."); Amaro, supra note 22 (throughout, using the phrase, "droit commun" to refer to the Civil Code as a source of general principles common to all private law); EVA STEINER, FRENCH LEGAL METHOD 15 (2002) (many Civil Code provisions state general principles rather than detailed rules).

47 The 1804 Napoleonic Code provided that an agreement between parties created a private law between them: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites." C. CIV. art. 1134 (Fr. 2015). As translated by Professor Crabb, the full text of Article 1134 reads: "Agreements legally made take the place of law for those who make them. They may be revoked only by mutual consent or for causes which the law authorizes. They must be executed in good faith." Crabb trans., supra note 19, art. 1134. Article 1103 of the reformed Civil Code maintains this concept: "Contracts which are lawfully formed have the binding force of legislation for those who have made them." REFORM IN ENGLISH, supra note 15, at 2, art. 1104. The reform also explicitly mentions freedom to contract, although in a larger context that suggests limits to this value: "Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation. Contractual freedom does not allow derogation from rules which are an expression of public policy." Id. at 2, art. 1102.

48 Article 5 of the 1804 Napoleonic Code restricted the scope of judicial decisions, prohibiting judges from announcing general principles that would apply to a broader category of cases than the dispute before the court: "Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises." C. CIV. art. 5 (Fr. 2015). Professor Crabb translates article 5 to read: "Judges are forbidden to pronounce decisions by way of general and regulative disposition on causes which are submitted to them." Crabb trans., supra note 19, art. 5; see Calleros, supra note 30, at 94–97 (discussing reasons for limits on judicial authority, and the limited judicial lawmaking that takes place); Adélaïde Remiche, When Judging Is Power: A Gender Perspective on the French and American Judiciaries, 3 J.L. & COURTS 95, 100–01 (2015) (explaining how the French judiciary is not an equal power in the French conception of separation of powers).

49 One law firm sounded this alarm: "the fact that the notion of ‘significant imbalance’ is not clearly defined is frightening: the judicial appraisal thus defines its own scope of intervention." EBA, supra note 16, at 1. But see Amaro, supra note 22, at 5, § 2 (reception of the assessment of significant imbalance into the Civil Code seems natural).
Similar tensions between the values of freedom of contract and protection against abusive terms have fed a long-running debate in the United States over the merits of the unconscionability doctrine. A comparison of U.S. law with that of the French reform, however, suggests that article 1171 of the reform should give little cause for concern, particularly in the reform's context within a European market governed by EU directives and despite the French tradition of limiting the power of the judiciary.

II. A BRIEF OVERVIEW OF THE U.S. EXPERIENCE WITH UNCONSCIONABILITY

Historically, courts in the common law system have withheld the equitable remedy of specific performance in actions to enforce unconscionably unfair exchanges, leaving the plaintiff to his legal remedy of money damages, however inadequate the legal remedy might be. But, the modern doctrine of unconscionability goes further, empowering judges to strike down a contract or a particular contract term, thus extinguishing an obligation and any means to enforce it.

A. Unconscionability under the Uniform Commercial Code

Although courts in the United States sowed the seeds of a general doctrine of unconscionability prior to the twentieth century, the doctrine

50 See, e.g., E. ALLAN FARNSWORTH, CONTRACTS §§ 4.27, 12.4, 12.7, at 294–97, 729–43, 751–57 (4th ed. 2004); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 16.7, at 560 (6th ed. 2009) (historically, specific performance was left to the "conscience" of the chancellor); id. § 16.14, at 565 (specific performance can be denied on grounds of unconscionability, which "constitutes the foundation stone of much of equitable doctrine"). For two oft cited twentieth century examples, see McKinnon v. Benedict, 38 Wis. 2d 607, 157 N.W.2d 665 (1968) and Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948). In Wentz, the court denied specific performance of a lopsided contract against a deliberately breaching grower, even though the remedy at law for money damages was inadequate, because "equity does not enforce unconscionable bargains." Id. at 83. The court stated that the proposition just quoted was "too well established to require elaborate citation," id., but it nonetheless cited to "4 POMEROY, EQUITY JURISPRUDENCE § 1405a (5th ed. 1941); 5 WILLISTON, CONTRACTS § 1425 (Rev. ed. 1937)."

received a great boost half a century ago from Section 2-302 of the Uniform Commercial Code: 53

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination. 54

On its face, this code provision makes substantial inroads into "ancient concepts of freedom of contract," which respect the contracting parties' exercise of autonomy in freely shaping their contractual rights and obligations as "private legislators." 56 When courts enforce the parties' contract as agreed, obeying the maxim that courts must not rewrite the

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53 Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1256 (2003) (stating that "the equitable doctrine of unconscionability [was] revitalized by its enactment" in the UCC); James F. Hogg, Consumer Beware: The Varied Application of Unconscionability Doctrine to Exculpation and Indemnification Clauses In Michigan, Minnesota, and Washington, 2006 Mich. St. L. Rev. 1011, 1013–15 (showing the influence of the intervening UCC on the common law in the progression from the First Restatement on contracts to the Second Restatement); Anne Fleming, The Rise and Fall of Unconscionability as the Law of the Poor, 102 Geo. L.J. 1383, 1405 (2014) (only a handful of jurisdictions had applied modern unconscionability doctrine prior to widespread adoption of the UCC).


56 Peter Nygh, Autonomy in International Contracts 2 (1999); see also supra note 48 (discussing the French Civil Code's declaration that the parties' agreement takes the place of law between them); Emily L. Sherwin, Law and Equity in Contract Enforcement, 50 Md. L. Rev. 253, 271 (1991) ("[A]t least the more traditional views of contractual autonomy hold that judicial relief against bad judgment or lack of sophistication denies the promisor the respect and equality required by liberal philosophy.").
contract for the parties, they increase certainty and predictability, thus encouraging parties to rely on their bargains. In contrast, Section 2-302 could reduce the certainty and predictability of enforcement because it fails to define unconscionability; it thus advances a vague and flexible standard that allows judges to exercise an exceptional degree of discretion in excluding contract terms. Moreover, its reference to “limit[ing] the application of any unconscionable clause” arguably grants judges the option of rewriting an objectionable clause rather than simply refusing to enforce it in total.

In sum, “Section 2-302’s broad mandate to strike or modify any unconscionable clause or contract makes it potentially the most freedom-limiting device available to courts.” Moreover, most courts recognize a similar unconscionability doctrine under common law for non-sales transactions.

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57 See, e.g., Jaeger v. Can. Bank of Commerce, 327 F.2d 743, 745 (9th Cir. 1964) (quoting City of New Orleans v. New Orleans Water Works Co., 142 U.S. 79, 91 (1891) for the proposition that “[c]ourts have no power to make new contracts or to impose new terms on them without their consent”); Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 (1999) (en banc) (in action to enforce noncompetition agreement, stating, “The court of appeals, in essence, rewrote the agreement in an attempt to make it enforceable. This goes too far.”).

58 NYGH, supra note 56.

59 See, e.g., Fleming, supra note 53, at 1422 (summarizing Arthur Leff’s “devastating critique” of the vagueness of the unconscionability doctrine); John E. Murray, The Judicial Vision Of Contract: The Constructed Circle Of Assent And Unconscionability, 52 DUQ. L. REV. 263, 263–65 (2014) (voicing scathing criticism of continuing lack of definition in Section 2-302 after years of judicial application); Sherwin, supra note 56, at 257–58 & n.23 (noting the indeterminacy of the fairness requirement for specific performance and remarking on the similarity of unconscionability analysis); DAVID SLAWSON, BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW 57 (1996) (case law is fact specific and has not resulted in a clear definition of unconscionability).

60 Cf. Ralph H. King, Suggested Changes in the Uniform Commercial Code—Sales, 33 OR. L. REV. 113, 115 (1954) (even completely striking out a clause and enforcing the rest “is in conflict with the maxim that courts will not make contracts for the parties”).

61 DiMatteo & Rich, supra note 52, at 1071.

62 See, e.g., Mandel v. Liebman, 303 N.Y. 88, 93-94, 100 N.E.2d 149, 152 (1951) (although finding no unconscionability, applying an unconscionability standard to a service contract); Korobkin, supra note 53; see RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (summarizing a common law principle of unconscionability); CAL. CIV. CODE § 1670.5 (2011) (legislatively recognizing unconscionability doctrine in any kind of contract); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448–49 (D.C. Cir. 1965) (viewing Section 2-302 as persuasive authority and applying a common-law doctrine of unconscionability to transactions executed prior to effective date of jurisdiction’s UCC); supra note 54 (sources discussing references to unconscionability prior to Section 2-302, or apart from it).
On the other hand, modern legal systems do not honor individual autonomy and freedom of contract to the exclusion of other values. Respect for the parties’ bargain is necessarily compromised to uphold public policies and to achieve justice in individual cases:

It is, of course, far too late in the day to seriously suggest that the law has not made substantial inroads into such freedom of private contracts. There exists an unavoidable tension between the concept of freedom to contract, which has long been basic to our socioeconomic system, and the equally fundamental belief that an enlightened society must to some extent protect its members from the potentially harsh effects of an unchecked free market system . . . . [T]he law has developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms which one party is able to impose . . . . because of a significant disparity in bargaining power.

Prior to the advent of Section 2-302, many courts sought to achieve this balance through aggressive use of traditional tools, such as through strained interpretation of contract terms. In contrast, the unconscionability doctrine provides courts in the United States with a more straightforward, less covert means of policing abusive contracting, just as article 1171 of the French reform provides the French judiciary with a more straightforward policing doctrine than the amorphous concept of cause. Further, some scholars have argued that the compromise to individual autonomy and free markets is

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63 See Aditi Bagchi, Contract as Procedural Justice, 7 JURIS. 47, 65 (2016) (“Autonomy is not all that is at issue in contract. . . . [D]istributive justice and background involuntary duties between individual duties shape the normative landscape of contract.”); Jay Lawrence Westbrook, Commercial Law and the Public Interest, 4 PENN. ST. J.L. & INT’L AFF. 445 (2015), http://elibrary.law.psu.edu/jlia/vol4/iss1/19 (describing the lack of consideration of public policy in commercial litigation and encouraging courts to identify public interest factors); Beh, supra note 51, at 1044 (unconscionable contracts “have negative impacts beyond the parties,” by “undermin[ing] basic principles of contract law and threaten[ing] social order”).

64 Rowe v. Great Atl. & Pac. Tea Co., 385 N.E.2d 566, 569 (N.Y. 1978) (quoted in DiMatteo & Rich, supra note 52); see also H.C.C., Jr., Note, Unconscionable Sales Contracts and the Uniform Commercial Code, Section 2-302, 45 VA. L. REV. 583, 592 (1959) (“Absolute freedom of contract is no more than a nineteenth century ideal; one which has never existed in our law.”).


66 Fleming, supra note 53, at 1405.

67 See supra notes 19–24.
modest. A party's autonomy includes justified freedom from contract when real consent to standard terms is doubtful. Judicial intervention in appropriate cases can increase confidence and participation in free markets by motivating traders to avoid insisting on abusive terms in standard-form contracts.

Fortunately, the concept of unconscionability did not remain completely undefined. The official comment to Section 2-302 provides a starting point by referring to "one-sided" clauses resulting in "oppression and unfair surprise." In the celebrated case of *Williams v. Walker-Thomas Furniture Co.*, an early decision applying the equivalent of Section 2-302, Judge Skelly Wright added further definition by focusing on "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." This definition fits nicely with the dual categories of procedural and substantive unconscionability, which Arthur Leff introduced in his critical review of Section 2-302 appearing two years after the *Williams* case. Most courts require the establishment of both branches to support a claim of

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68 Korobkin, *supra* note 53, at 1205 (discussing argument that enforcement of standard-form terms undermines the individual autonomy of the non-drafting party, who is bound by terms which he or she had no opportunity to negotiate); Fleming, *supra* note 53, at 1400 (summarizing Kessler's argument that enforcement of standard-form, adhesion contracts concentrated economic power in a way that threatened freedom); Bagchi, *supra* note 63, at 24 (discussing autonomy interests in the freedom to change one's mind and revise commitments to match present goals and needs).

69 Westbrook, *supra* note 63, at 448; see also Keren, *supra* note 52, at 109 (promoting "judicial decisions condemning exploitative bargaining practices . . . to galvanize self-restraint by participating in the social cueing of conscience"); Beh, *supra* note 51, at 1042 (asserting that courts "can exercise their discretion to promote conscionable contracting in the marketplace."). *But cf.* id. at 1022 (because so few disputes are litigated, the unconscionability doctrine will be effective only if it deters abusive clauses from the outset); id. at 1013 ("[T]he hammer of unconscionability rarely changes bargaining behaviors, particularly among institutional repeat players.").


71 350 F.2d 445 (D.C. Cir. 1965).

72 In *Williams*, the court applied the common law equivalent of Section 2-302 because the UCC had been adopted but was not yet effective in the District of Columbia at the time of the transaction. *Id.* at 448–49.

73 *Id.* at 449.

unconscionability, but many allow a strong showing on one branch to compensate for minimal unconscionability on the other branch.

Judge Wright explained that absence of meaningful choice (procedural unconscionability) implicated factors such as inequality of bargaining power, level of education of the parties, and a reasonable opportunity to find and understand the terms. Over the next decade, courts analyzing procedural unconscionability found relevance in these and other factors:

age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.

Perhaps the most important procedural issue is whether the terms of the contract were subject to negotiation and alteration, or whether one party had sufficient bargaining power to impose its terms in an adhesion contract, presenting non-negotiable terms to which the other party must "adhere." Although the unconscionability doctrine is not limited to adhesion contracts, most cases involve adhesion contracts, and some courts find that a requisite degree of procedural unconscionability is established by that factor alone.

77 Williams, 350 F.2d at 449.
79 Edwin Patterson provided this early definition of contracts: “Life-insurance contracts are contracts of ‘adhesion.’ The contract is drawn up by the insurer and the insured, who merely ‘adhere’ to it, has little choice as to its terms.” Edwin W. Patterson, The Delivery of a Life-Insurance Policy, 33 HARV. L. REV. 198, 222 (1919) (footnote notation omitted) (citing in part to René Demogue, in MODERN FRENCH LEGAL PHILOSOPHY, 472, 477; 2 M. PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, § 972); see also infra note 159 (use and translation of this term in the French Civil Code).
80 E.g., Fleming, supra note 53, at 1421.
81 Murray, supra note 59, at 266; Maxeiner, supra note 76, at 117–18.
82 See, e.g., Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002) (applying California law); see also Korobkin, supra note 53, at 1258 n.201 (reviewing cases and concluding that most courts do not find procedural unconscionability on the basis of adhesion contract alone).
Disparate bargaining power alone does not establish procedural unconscionability, but it often enables parties with superior bargaining strength to impose contracts of adhesion, which “bear within them the clear danger of oppression and overreaching.” Disparate bargaining power and consequent adhesion contracts are a frequent feature of consumer contracts; however, even an experienced businessperson can fall victim to unconscionable terms imposed by a business entity with greater bargaining power.

In Williams, Judge Wright stated that a finding of procedural unconscionability justifies abandoning the traditional rule that a party is strictly bound by a contract that he has signed—even though he may not have read or understood it—and it consequently triggers an analysis of “reasonableness or fairness.” For this substantive branch of unconscionability, Judge Wright quoted with approval Corbin’s standard: “whether the terms are ‘so extreme as to appear unconscionable according to the mores and business practices of the time and place.’” Admittedly, this circular definition adds little more than a general factual context for assessing the unfairness of a clause or contract. Again, repeated judicial applications over the years helped courts to develop more concrete guidance:

Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed. . . . Indicative of substantive unconscionability are

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84 Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 818, 623 P.2d 165, 171 (1981); see also Rowe v. Great Atl. & Pac. Tea Co., 385 N.E.2d 566, 569 (N.Y. 1978) (referring to “onerous contractual terms which one party is able to impose . . . because of a significant disparity in bargaining power”); see also Murray, supra note 59, at 271 ("There is no question that parties, particularly consumers, do not read the boilerplate that invariably attaches to standardized transactions.").

85 See generally AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011) ("[T]he times in which consumer contracts were anything other than adhesive are long past.").

86 E.g., Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 623 P.2d 165 (1981) (experienced rock music promoter Bill Graham had no choice but to hire musical acts through union’s adhesion contract, with unconscionable term); Nagrampa v. Mailcoups, Inc., 469 F.3d 1257 (9th Cir. 2006) (parent company with greater bargaining power imposed unconscionable arbitration clause on individual franchise holder).

87 See Murray, supra note 59, at 270 (referring to the “sacred rubric of contract law that one is bound by the terms to which he apparently agreed, regardless of whether he read or understood such terms”).

88 Williams, 350 F.2d at 449–50.

89 Id. at 450 (citing to 1 CORBIN, CONTRACTS § 128 (1963)).
contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity. 90

The final factor quoted above is significant because it appears to undermine the traditional rule that courts will not assess the equality or fairness of an exchange under the consideration doctrine. 91 This tension with consideration analysis is especially great if a court permits a finding of unconscionability on the basis of substantive unconscionability alone and then finds substantive unconscionability on the basis of an inflated price or other imbalance in the main obligations of the contract. 92

Because Judge Wright remanded for findings under the standard he announced in Williams, he did not apply his standard to the facts and announced no decision on a buyer’s challenge to a draconian repossession clause. 93 In stating the procedural history, however, Judge Wright quoted two paragraphs from the District of Columbia Court of Appeals, which strongly condemned a vendor for selling a stereo set and other household goods to a recipient of government support “with full knowledge that [she] had to feed, clothe and support both herself and seven children” on a monthly government stipend of less than half of the cost of the stereo set. 94 Against that backdrop, dissenting Judge Danaher warned of misplaced paternalism undermining a source of credit for clients on government relief, erosion of freedom of contract, and uncertainty about the enforceability of “thousands upon thousands of installment credit transactions in this jurisdiction.” 95

91 See, e.g., Batsakis v. Demotsis, 226 S.W.2d 673 (Tex. Ct. Civ. App. 1949) (declining to upset bargain requiring repayment of $2,000 plus interest in exchange for loan of Greek currency allegedly worth $25 at the time of the loan); RESTATEMENT (SECOND) OF CONTRACTS § 79(b) (1981) (rejecting any requirement of "equivalence in the values exchanged" if other elements of consideration are met).
92 See, e.g., Maxwell, 907 P.2d 51, 59–60 (permitting trial court to find unconscionability on basis of substantive factors alone, and stating "[t]hese facts present at least a question of grossly-excessive price, constituting substantive unconscionability"); see also id. at 93, 907 P.2d at 62 (Martone, J., concurring in judgment) (opining that court could find unconscionability as a matter of law without further findings on remand).
93 Williams, 350 F.2d at 450.
94 Id. at 448.
95 Id. at 450–51 (Danaher, J., dissenting).
B. Retrenchment in Judicial Intervention

In the years following the Williams decision, many courts appeared to heed the concerns expressed by Judge Danaher. In resolving the tension between freedom of contract and judicial intervention to achieve fairness, courts generally respected the parties’ bargain absent exceptional unfairness that satisfied an increasingly demanding test of shocking the court’s conscience. This judicial conservatism coincided with a return to textualism and formalism in contract law, with the growth of the law and economics movement, and with conservative political movements against government regulation and judicial activism. By the 1980’s, according to E. Allan Farnsworth, unconscionability had suffered from “arrested development.”

The unconscionability doctrine later enjoyed resurgence as a means of policing asymmetric or otherwise unfair mandatory arbitration clauses, particularly in California, where judicial application of unconscionability doctrine had remained fairly robust. However, the Supreme Court blunted

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97 See Keren, supra note 52, at 443; see also Maxeiner, supra note 76, at 121 (unconscionability “has proven to be a hard standard to meet”).

98 See Cheryl B. Preston & Eli McCann, Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism, 91 Ore. L. Rev. 129, 161–67 (2012); Jeffrey W. Stempel, Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism, 19 Ohio St. J. on Disp. Resol. 757, 821–24 (2004) (discussing all these factors); Fleming, supra note 53, at 1430–31 (reviewing conservative political critique against judicial activism and law-and-economics arguments against the competence of courts to make distributive decisions); Keren, supra note 52, at 119–20; see also Sherwin, supra note 56, at 269 (“Judicial inquiry into the adequacy of values exchanged [in withholding specific performance] is inconsistent with economic theory because it violates the principle that value is subjective and best left to the judgment of the parties.”).


100 See, e.g., Murray, supra note 59, at 271 (arbitration clauses overcame judicial hesitation in applying unconscionability); Beh, supra note 51, at 1032–34; Nagrampa v. Mailcoup, Inc., 469 F.3d 1257 (9th Cir. 2006) (arbitration at location of parent company’s corporate headquarters placed unfair burden on individual franchise holder of limited means who lived on opposite coast).

the resurgence in the arbitration context by holding that the Federal Arbitration Act precluded the application of state unconscionability doctrine to strike down class action waivers in mandatory arbitration clauses,\(^{102}\) thus insulating firms from large numbers of claims too small to justify the costs of individual arbitration.\(^{103}\)

C. Alternatives to Unconscionability

1. Reasonable Expectations

As a supplement to unconscionability, some commentators have argued for application of a reasonable expectations doctrine\(^ {104}\) to exclude oppressive terms in lengthy standard-form contracts that the non-drafting party cannot be expected to read in light of the bargaining context.\(^ {105}\) Under this doctrine, a party who manifests assent to a form in such a context is held to all terms

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\(^{102}\) AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); see also Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2016) (Federal Arbitration Act (FAA) blocks challenge to class action waiver even though cost of proving anti-trust allegations makes individual claim economically unviable). AT&T does not preclude application of unconscionability doctrine to asymmetry or other unfairness aside from class action waivers. See, e.g., Samaniego v. Empire Today LLC, 205 Cal. App. 4th 1138, 1150 (2012) (arbitration clause in an employment agreement was unenforceable under the state’s general unconscionability test, because the arbitration clause was buried deeply in an adhesion contract and was substantively lopsided in favor of the employer).

\(^{103}\) See, e.g., J. Maria Glover, Disappearing Claims and the Erosion of Substantive Law, 124 YALE L.J. 3052 (2015). One commentator opines that the Supreme Court’s recent arbitration jurisprudence reflects a second era of privileging freedom of contract over equity, comparable to the Lochner era, during which freedom of contract had a constitutional status. Hila Keren, Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity, 2 CAN. J. COMP. & CONTEMP. L. 339 (2016).

\(^{104}\) Murray, supra note 59, at 273 ("The solution to the printed clause dilemma that would encompass most of the unconscionability cases is a general recognition of the reasonable expectations concept."); Maxeiner, supra note 76, at 120 (distinguishing the reasonable expectations doctrine from section 211 of the second Restatement); Eric A. Zacks, The Restatement (Second) Of Contracts § 211: Unfulfilled Expectations And The Future Of Modern Standardized Consumer Contracts, 734 WM. & MARY BUS. L. REV. 733, 757 (praising RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981), which is similar to the reasonable expectations doctrine, as a reasonable compromise between competing values); Charles R. Calleros, The Reasonable Expectations of Consumers, CONTRACTSPROF BLOG (May 28, 2013), http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-part-xiii-charles-calleros.html (invited essay for online symposium on BOILERPLATE by Margaret Jane Radin).

that lie within a reasonable range for such contracts but would not be bound by bizarre or oppressive terms that lie outside the bounds of reasonable expectations. Even a highly surprising term could be brought within the range of reasonable expectations if the drafting party gave specific notice of the provision to the non-drafting party, such as pointing out and explaining the term and requiring specific assent through initials next to a term or through a separate click on a website.\textsuperscript{106} The reasonable expectations doctrine for standard-form contracts, however, has gained much less traction in the courts than unconscionability.\textsuperscript{107}

2. Specific Legislative and Administrative Regulation

In light of limitations on judicial intervention, judges and commentators have frequently argued for specific legislative and administrative regulation of abusive contract terms, much like the approach taken in the French Consumer Code and the EU Directive on Unfair Contract Terms.\textsuperscript{108} In the Williams case, for example, Judge Danaher supported the view of the court below that the legislature should specifically address the problems reflected

\textsuperscript{106} See Korobkin, supra note 53, at 1246-47 (positing this approach but noting the problem of consumer's bounded rationality concerning some contract terms, even when the terms are brought to a consumer’s attention); see also Maxeiner, supra note 76, at 125 (explaining that an early draft of the abandoned revision of UCC article 2 proposed a rule that would have encouraged this practice). Of course, lawmakers could categorically prohibit certain kinds of terms so that even specific notice and assent would not support enforcement. See, e.g., infra note 111 (executive order, regulatory proposal, and legislative bills that have or, if adopted, would bar pre-dispute arbitration agreements in some contexts or for some purposes).

\textsuperscript{107} Zacks, supra note 104, at 757-60 (noting the low level of acceptance of section 211 of the second Restatement, except in Arizona, where courts have frequently focused on the reasonable expectations of the consumer, in contrast to the focus of section 211 on the belief of the vendor about the consumer's lack of knowledge); Korobkin, supra note 53, at 1271 & n.264 (noting that reasonable expectations doctrine apparently has been “almost completely forgotten by courts, at least outside the realm of insurance contracts” and other than in the state of Arizona); Preston & McCann, supra note 98, at 160-61 (observing that reasonable expectations doctrine fared worse than unconscionability, but Tennessee courts developed a “circle of assent” doctrine that borrowed elements from reasonable expectations).

\textsuperscript{108} See supra notes 33–36 and accompanying text (explaining the approach taken in the French Consumer Code, in implementation of an EU Directive); Aaron E. Ghirardelli, Rules of Engagement in the Conflict Between Businesses and Consumers in Online Contracts, 93 OR. L. REV. 719, 756–69 (2015) (reviewing and recommending European approaches, including administrative lists of presumptively abusive and forbidden contract terms); Keren, supra note 52, at 497 (noting that norms against commercial exploitation are “[i]deally” announced by legislatures, as in other Western legal systems, but unconscionability doctrine can “send a clear and general message” in the meantime).
by "exploitive contracts as were utilized in the case." Since that 1965 decision, several commentators have voiced support for more robust and specific legislative and administrative regulation of abusive contract terms and bargaining tactics, either as a form of regulation that is superior to judicial scrutiny for unconscionability or as a welcome element of a comprehensive legal framework.

In recent years, this call has been heeded to a limited extent in the regulation of mandatory arbitration clauses. In 2014, for example, President Obama issued an executive order on "Fair Pay and Safe Workplaces," forbidding major federal contractors from requiring employees to agree, prior to a dispute, to mandatory arbitration of claims of sexual assault or harassment. Earlier, in the aftermath of the financial crash of 2008, Congress passed the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, which prohibited mandatory arbitration agreements in certain contexts in the financial industry, and established the Bureau of


110 E.g., Arthur Allen Leff, Unconscionability and the Crowd—Consumers and the Common Law Tradition, 31 U. PITT. L. REV. 349, 352 n.18, 352–58 (1970) (recommending legislative regulation of standard-form contracts as a type of product and noting deficiencies of case-by-case judicial regulation without legislative or administrative guidance); Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. PA. L. REV. 1, 84–100 (2008) (arguing that a motivated regulatory agency with sufficient authority can be more nimble and innovative than a legislature); Peter Linzer, Contract as Evil, 66 HASTINGS L.J. 971, 985 (2015) ("There is plenty of agency power, federal and state, that can be used against adhesion contracts and the like, and we should actively seek its use."); Fleming, supra note 53, at 1429–30 (explaining that legislation in the aftermath of the Williams case provided more effective relief from abusive financial terms in the D.C. jurisdiction than judicial application of unconscionability); JONATHAN C. LIPSON, STEWART MACAULAY, WILLIAM C. WHITFORD & KATHRYN HENDLEY, CONTRACTS: LAW IN ACTION 200 (4th ed. 2016) (summarizing Jean Braucher’s view that specific rules adopted through legislation and especially through administrative regulation can change commercial behavior at the outset, without the need for litigation); Zacks, supra note 104, at 793 (discussing benefits of administrative regulation, "particularly where clearly identifiable problems have emerged"); see also State ex rel. King v. B&B Inv. Grp., Inc., 329 P.3d 658 (N.M. 2014) (finding and providing remedies for an unconscionable trade practice under the state’s Unfair Practices Act, which authorized suit by the state on behalf of a consumer). But see Todd Zywicki, The Dodd-Frank Act Five Years Later: Are We More Stable?, 43 J. FIN. TRANSFORMATION 62 (2016) (critiquing Dodd-Frank legislation and the Bureau as arbitrary and counter-productive regulation).


113 Id. § 1414(e) (codified as 15 U.S.C. 1639c(e)) (prohibiting arbitration agreements in connection with mortgage loans); id. § 922(b) (codified as 18 U.S.C. 1514A(e)) (prohibiting arbitration agreements in connection with certain types of whistleblower proceedings); see
Consumer Financial Protection. The Act empowered the Bureau to (1) study and report findings to Congress about pre-dispute arbitration agreements in connection with consumer financial products or services and (2) issue regulations prohibiting or limiting such agreements, consistent with the Bureau’s study, if such regulation is in the public interest and for the protection of consumers. In 2016, after publishing a notice of proposed rulemaking and requesting comment, the Bureau issued regulations that require providers of financial products or services to (1) submit specified arbitral records to the Bureau for any pre-dispute arbitration agreement that it includes in a consumer contract, (2) refrain from seeking to rely on a pre-dispute arbitration agreement in connection with a class action related to consumer financial products or services, and (3) provide plain-language notice in pre-dispute arbitration agreements of the inapplicability of the arbitration agreement to class actions claims. While this proposed rule of the Bureau was pending, two other federal agencies issued final rules regulating pre-dispute arbitration clauses in certain kinds of contracts. But

also id. §§ 921(a), 921(b) (codified as 15 U.S.C. 78o(e), 80b-5(f)) (authorizing the SEC to regulate arbitration agreements in transactions between consumers and securities broker-dealers or investment advisors).

114 Id. § 1011 (codified as 12 U.S.C. § 5491).
115 Id. § 1028(a) (codified as 12 U.S.C. § 5518(a)).
116 Id. § 1028(b) (codified as 12 U.S.C. § 5518(b)).
118 Notice of Proposed Rulemaking, supra note 117, at 201. As this article was going to print, the Bureau issued a final rule in July 2017, making the arbitration regulations effective September 18, 2017, unless overturned by Congress. Bureau of Consumer Financial Protection, Arbitration Agreements, 12 CFR Part 1040, 82 Fed. Reg. 33210 (July 19, 2017).

119 The Department of Health and Human Services issued a final rule prohibiting pre-dispute arbitration clauses in nursing home contracts. 81 FR 68688, RIN 0938-AR61, § 483.70(n), at 68867 (Oct. 4, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-10-04/pdf/2016-23503.pdf. Similarly, the Department of Education has issued a final rule amending the Federal Direct Loan Program to prohibit participating schools from invoking pre-dispute arbitration agreements or class action waivers, and requiring them to provide certain notices and disclosures regarding arbitration. 34 FR 75926, RIN 1840-AD19, § 685.300(e)-(g) (Nov. 1, 2016), https://www.gpo.gov/public/do/eAgendaViewRule?pubId=201610&RN=1840-AD19. One can anticipate litigation raising the issue whether such regulations are inconsistent with the FAA or are supported by legislation that supersedes the FAA. See, e.g., Dep’t Educ., Borrower Defense Regulations: November 2016, Unofficial Final Regulations, pp. 550–67; see also id. at 563 n.80 (listing examples of federal statutes that authorize regulation of arbitration in certain contracts). More broadly, congressional bills introduced in 2015 would bar enforcement of pre-dispute arbitration agreements as applied to employment, consumer,
elections have consequences, leaving these regulatory efforts subject to reversal or rollback by the Trump administration and Congress.

In sum, the U.C.C. brought the unconscionability doctrine into the mainstream of contract law across the United States, but controversy over its vague standards led to judicial restraint in its application in most courts. Hazel Glenn Beh argues for a judicial "attitudinal adjustment" to the extent of "embrac[ing] unconscionability’s flexibility as a necessary counterweight to mindless formalism and rigidity" and "recogniz[ing] that unconscionability shares the objectives of illegality" and should trigger a similar guardian function. To effectively regulate abusive contract terms and contracting tactics while avoiding controversy over the appropriate role of the judiciary, Russell Korobkin argues for a "combination of market, legislative, and judicial action designed to capitalize on the advantages and minimize the disadvantages of all three institutions." To the extent that market forces such as consumer choice and reputational effects do not discourage abusive practices, and to an extent consistent with political realities, policing functions can be shared by legislatures, administrative agencies, and the judiciary, in ways that capitalize on their respective strengths.

antitrust, and civil rights disputes. Arbitration Fairness Act of 2015, S. 1133, 114th Cong. § 3 (2015); Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. § 3 (2015). However, Congress has not moved them forward.

120 See supra note 53.
121 See supra notes 97–104.
122 Beh, supra note 51, at 1039–40.
123 Korobkin, supra note 53, at 1254; see also supra notes 108–10 and accompanying text.
124 Korobkin, supra note 53, at 1206, 1246–47 (consumers can motivate businesses to compete in some markets, but only with respect to salient features, based on information that consumers effectively process in light of their bounded rationality); Farnsworth, supra note 50, § 4.28, at 307 ("[R]arely can a party claim surprise as to price."). Amaro, supra note 22, at 6, § 6 (French Consumer Code apparently reflects assumptions that consumers pay attention to price and can elicit competition on price but require protection from abusive auxiliary clauses, such as liability limitations and arbitration clauses, which escape their attention or comprehension); Leff, supra note 110, at 350 (consumers often lack information and expertise to critically compare standard form contracts and do not focus on terms relating to the deal breaking down).
126 See, e.g., Korobkin, supra note 53, at 1249, 1294–95 (legislatures and regulatory agencies are better able than courts to define mandatory terms for contracts, but courts are experts at reviewing terms in the contract); Robert A. Hillman, Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302, 67 CORNELL L. REV. 1, 28 (1981) (arguing that a degree of judicial flexibility is warranted because "legislators cannot successfully draft legislation to encompass unforeseen circumstances"); Murray, supra note
III. HONORING AND CONTROLLING FREEDOM OF CONTRACT IN FRANCE

A. An Evolving Balance of Principles and Values

The 1804 Napoleonic Code strongly reflected principles of freedom of contract and respect for individual autonomy, with necessary qualifications: "Agreements legally made take the place of law for those who make them. They may be revoked only by mutual consent or for causes which the law authorizes. They must be executed in good faith." 127

However, one provision of the 1804 Civil Code, article 1152, was unqualified in its deference to party autonomy and freedom of contract. Its original text and modern evolution shed light on the French ideals of freedom of contract, respect for individual autonomy, and limits on judicial authority, as well as recent trends compromising those ideals to protect weaker parties.

For more than a century and a half, article 1152 addressed contractually stipulated damages in a single sentence: "When an agreement provides that he who fails to execute it shall pay a sum certain by way of damages, there may not be awarded to the other party a greater or lesser sum." 128 Under this unqualified command, French courts enforced contractual penalty clauses without adjustment, 129 even though the Code permitted no more than

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59, at 273 ("[c]ourts pursue the parties' reasonable expectations in virtually every contract case they decide" and thus can be trusted to apply a reasonable expectations doctrine).

127 Crabb trans., supra note 19, art. 1134. The Civil Code Reform includes similar principles, although in expanded form:

Art. 1102. – Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation.

Contractual freedom does not allow derogation from rules which are an expression of public policy.

Art 1103. – Contracts which are lawfully formed have the binding force of legislation for those who have made them.

Art. 1104. – Contracts must be negotiated, formed and performed in good faith.

C. civ. art. 1102-04 (Fr. rev. 2016).

128 C. civ. art. 1152. In its original French, the 1804 text read: "Lorsque la convention porte que celui qui manquera de l'exécuter payera une certaine somme à titre de dommages-intérêts, il ne peut être alloué à l'autre partie une somme plus forte, ni moindre." C. civ. art. 1152, 1st sentence (Fr. 2015).

compensation, in the absence of contractually stipulated damages, on claims for breach of contract or even in tort.\footnote{130 See Calleros, supra note 30, at nn.137–38 and accompanying text (presenting French text and English translations for C. civ. art. 1382, 1147 (Fr. 2015)). By legislation adopted in 1972, a court can issue fines, in an order of astreinte, to compel a dilatory party to perform a contractual obligation after a judicial finding of breach of contract, but astreinte resembles a preemptive contempt sanction more than extra-compensatory damages for breach. Id. at 99.}

This exceptional treatment of penalty clauses partly reflects a distrust of the judiciary after the French Revolution in reaction to the perceived excesses of the pre-revolutionary high courts, the Parlements, which sometimes exercised quasi-legislative powers.\footnote{131 See John P. Dawson, The Oracles Of The Law 273–74, 306–14, 350–71 (Greenwood Press 1978) (1968).} The Constituent Assembly of 1790 banned judicial issuance of regulations,\footnote{132 See supra note 48 (presenting the text and English translation of C. civ. art. 5 (Fr. 2015)).} and the 1804 Civil Code prohibited French courts from declaring legal principles unnecessary to resolve the disputes before them.\footnote{133 Remiche, supra note 48; see also Steiner, supra note 46, at 29, 32 (noting that the 1790 law precluding the judiciary from exercising legislative power “forms the basis for the French doctrine of separation of powers”).} The judicial branch emerged as less than coequal with the legislative and executive branches.\footnote{134 John Yukio Gotanda, Supplemental Damages In Private International Law 193 (1998) (discussing the approach in civil law jurisdictions generally).}

This backlash against the judiciary, combined with a high regard for individual autonomy and liberty in the wake of the Revolution, helps to explain the French approaches to punitive damages and penalty clauses, which appear at first glance to point in different directions. Absent the protections afforded by criminal proceedings, the Code precludes the courts from wielding excessive power and intruding on individual autonomy through an award of punitive damages for breach of contract.\footnote{135 See supra note 127 and accompanying text.} If the parties had agreed in their contract to impose a penalty, however, article 1152 of the original Code essentially ordered courts to respect the parties’ autonomy and freedom to contract: “there may not be awarded to the other party a greater or lesser sum.”\footnote{136 See supra note 127 and accompanying text (presenting the text and translation of C. civ. art. 1134 (Fr. 2015), as well as counterparts in the reformed Civil Code).} Thus, the rules are consistent in reflecting great respect for individual freedom and limits on the exercise of judicial power.

Even the original Code’s explicit reference to freedom of contract required deference only to contracts “legally made . . . in good faith,”\footnote{137 See supra note 20.} formed with a “cause [that is] lawful.”\footnote{138 See supra note 20.}
provided opportunities for the judiciary to apply and shape statutory limitations on individual autonomy and freedom of contract.  

B. Consumer Protection Movement—Finding a Balance

Over the last half century, further inroads into freedom of contract have been laid by French and EU legislation, designed to protect weaker parties in contracts and necessarily reflecting or requiring a softening of the post-revolutionary distrust of the judiciary in France. For example, in 1975, coinciding with the rise in the consumer protection movement in Europe, the French legislature amended article 1152 of the Civil Code to empower a judge to reduce a manifestly excessive contractual penalty clause or to increase manifestly inadequate liquidated damages. The legislature amended the article again in 1985 to permit adjustment on the judge’s own motion. These amendments provided judges with great discretion in appropriate cases to revise a damages clause agreed to by the parties.

In 1975, the same year as the first amendment to article 1152, the European Council exercised its role of setting the political agenda for the European Union by approving a preliminary program of consumer protection and information. This and subsequent programs “served as a basis for an ever growing corpus of directives and regulations in the area of consumer protection,” reaching approximately ninety directives by 2015.

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139 See, e.g., supra notes 20–22.
140 See supra notes 29–48 and accompanying text.
141 See Maxeiner, supra note 76, at 131 (referring to the timing of a European resolution on unfair terms).
142 See supra note 30.
143 See supra note 30.
144 A court cannot adjust a contractual penalty unless it has determined that the penalty is manifestly excessive, the standard for which is influenced by academic commentary and decisions of the Cour de cassation. Calleros, supra note 30, at 105–06. However, once that determination is made, the court appears to have broad discretion in determining the appropriate adjustment of the penalty; although in most cases, the court will preserve some portion of the penalty agreed to by the parties, even if reduced. Id. at 106–07.
146 Euro. Parl., Consumer protection in the EU, Policy Overview § 1.3.1, at 4–5 (Sept. 2015) [hereinafter Policy Overview], http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf. By the time it announced its 1975 program, the EU had already taken a number of actions and issued directives relating to consumer protection, beginning in the early 1960’s. Preliminary Programme, supra note 145, app. 1 at 12, app. 2 at 13–16. A common criticism of EU consumer legislation is fragmentation: adopting numerous measures that separately address narrow issues. See Policy Overview, supra note 146, § 3.2, at 12. For recent developments in EU consumer protection, see,
The most important of these directives for the present topic is the 1993 Directive on Unfair Terms in Consumer Contracts which directed Member States of the EU to enact national laws providing that non-negotiated unfair terms in a consumer contract are not binding on the consumer, and that written terms must be drafted in plain, intelligible language. In article 3, the directive set forth a general definition of unfair terms and referred to an annex of specific types of contract terms that EU member states would be permitted to deem unfair:

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Article 4.2 limited the universe of unfair terms, however, to auxiliary terms:

Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor

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147 EU DIR. 93/13, supra note 35 (amended in ways not relevant to the current topic in EU Directive on Consumer Rights, supra note 146, art. 32). Unlike EU Regulations, directives set forth legal outcomes, leaving the details of implementation to Member States. See supra note 29. Accordingly, directives “can be transposed into national law differently.” *Policy Overview, supra* note 145, at 5; *see also* TWIGG-FLESNER, supra note 29, at 19.

149 Id. art. 5.

to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.\textsuperscript{151}

French lawmakers implemented this directive by enacting article L. 132 of the French Consumer Code.\textsuperscript{152} Article L. 132-1 (1) declared that unfair terms are void, (2) defined as unfair a term in any contract between a professional and either a consumer or other non-professional that creates a significant imbalance in the rights and obligations to the detriment of the consumer or non-professional, (3) authorized the Council of State (Conseil d’État) to issue decrees listing types of clauses that must be regarded as unfair, (4) included an annex with an illustrative and non-exhaustive list of terms that may be regarded as unfair in light of all the terms and circumstances of the contract, and (5) provided that the evaluation of unfair terms could not involve the main purpose of the contract or the price or other compensation for goods or services, so long as the terms were written clearly.\textsuperscript{153} Article L. 132-2 delegated to a “Commission des clause abusives,” within the Ministry of Consumer Affairs, the task of identifying abusive terms,\textsuperscript{154} with article L. 132-1 providing that the Council of State will issue its decrees on the advice of the Commission.\textsuperscript{155}

Article L. 132-1 of the French Consumer Code exceeded the minimum requirements of the directive by regulating all consumer contracts,\textsuperscript{156} as

\textsuperscript{151} EU Dir. 93/13, supra note 35, art. 4.2.
\textsuperscript{153} C. CONS. art. L. 132-1 (Fr. 2005) (Act no. 95-96 of 1 February 1995 art. 1, annex to the Journal officiel of 2 Feb. 1995). Article L. 132-1 does not include the EU Directive’s reference to “good faith”; however, the Directive’s mention of good faith was not intended to add a second requirement beyond a showing of significant imbalance. Maxeiner, supra note 76, at 134–35.
\textsuperscript{154} C. CONS. art. L. 132-2 (Fr. 2005).
\textsuperscript{156} The first line of an English translation of art. L. 132-1 omits any requirement of a standard-form or non-negotiated contract: “In contracts concluded between a business and a non-business or consumers, clauses which aim to create or result . . . .” C. CONS. art. L. 132-1 (Fr. 2005, Eng. ed.).
permitted by the directive, rather than just ones of adhesion. Moreover, it empowered French judges to assess fairness under the standard of significant imbalance, which is roughly as broad as the concept of substantive unconscionability. Article L. 132-1 represents a modest departure from post-revolutionary regard for personal autonomy and distaste for a strong judiciary because judges are guided by legislative and administrative lists of possibly abusive terms. Further, French law allows a judge to ask the Commission des clause abusives for a non-binding opinion on an allegation of an unfair contract term in judicial proceedings.

A less restricted delegation of judicial power can be found in the French Commercial Code provisions regulating transactions between businesspersons or business entities. Article L. 442-6, I of that Code imposes liability on a person or entity in business who:

1. obtains or attempts to obtain from a business partner an advantage of any sort that . . . is manifestly disproportionate to the value of the service provided . . .
2. subjects or attempts to subject a business partner to obligations that create a significant imbalance in the rights and obligations of the Parties;


157 The twelfth paragraph of the findings in the preamble to the directive contemplates elevated national laws on just this issue:

Whereas, however, as they now stand, national laws allow only partial harmonization to be envisaged; whereas, in particular, only contractual terms which have not been individually negotiated are covered by this Directive; whereas Member States should have the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive . . .;
EU DIR. 93/13, supra note 147, at 95/30. Article 8 of the Directive more generally authorizes member states to adopt more consumer-protective implementing legislation than the minimum harmonization required by the Directive. Id. art. 8; Maxeiner, supra note 76, at 133-34.

158 See supra notes 88-89 and accompanying text.

159 In 2016, for example, a French appellate court applied a provision of the list of presumptively unfair clauses to strike down a forum selection clause in a Facebook adhesion contract. Arret Du 12 Fevrier 2016, Cour D'Appel de Paris, Ch. 2, RG N°15/08624, pp. 5-6.


161 See supra notes 38-40.
4. obtains or attempts to obtain, under the threat of a sudden severance of business relations, clearly abusive conditions concerning the prices... that do not arise from the obligations of purchase and sale.\textsuperscript{162}

The second prohibited action in article L. 442-6 mirrors the significant-imbalance test in article L. 132-1 of the Consumer Code and article 1171 of the reformed Civil Code. A Commission, the CEPC, issues recommendations regarding commercial practices but has not issued a list of contract terms that should be prohibited under the significant imbalance standard and has not otherwise provided original guidance on that standard.\textsuperscript{163}

Unlike the Commercial and Consumer Codes, article 1171 of the reformed Civil Code empowers judges to identify and regulate a significant imbalance without a direct tether to administrative or legislative examples of prohibited or problematic provisions or to administrative recommendations regarding contractual provisions.\textsuperscript{164} Granted, when adjudicating an article 1171 claim, one might expect judges to consult the administrative guidance specifically tied to the Consumer and Commercial Codes, when it might provide general guidance for applying article 1171. Nonetheless, the absence of a direct link to administrative guidance appears to loosen the reins on judicial application of the significant-imbalance test in article 1171.

In another way, article 1171 straddles both the Consumer Code and the Commercial Code because it applies to contracts between any types of contracting parties, whether consumer contracts or ones between professionals. At the same time, however, it is more restrictive than both because article 1171 applies only to adhesion contracts.\textsuperscript{165}

\textsuperscript{162} Raworth trans., supra note 38, at 436–39; C. COM. art. L. 442-6 (Fr. 2015).

\textsuperscript{163} See supra notes 40–44 and accompanying text. Although a court can refer an issue to the CEPC, the CEPC will publish its analysis only after the court has issued its decision. C. COMM. L. 440-1 IV. That procedure is consistent with the CEPC reporting on court decisions rather than issuing its own original interpretations of the statutory standard. See supra note 44 and accompanying text.

\textsuperscript{164} Cf. supra notes 36–42.

\textsuperscript{165} Article 1171 begins with the phrase “Dans un contrat d’adhésion, toute clause” C. CIV. art. 1171 (Fr. rev. 2016). The translation invited by the Ministry of Justice translated this phrase to “[a]ny term of a standard form contract.” REFORM IN ENGLISH, supra note 15, at 14, art. 1171. In turn, the new Civil Code defines “contrat d’adhésion” in the following way: “Le contrat d’adhésion est celui dont les conditions générales, soustraites à la négociation, sont déterminées à l’avance par l’une des parties.” C. CIV. art. 1171 (Fr. rev. 2016). The invited translation translates this provision to: “A standard form contract is one whose general conditions are determined in advance by one of the parties without negotiation.” REFORM IN ENGLISH, supra note 15, at 3, art. 1110, sent. 2. In their footnote 5, the translators add this
The most notable difference between these three articles is the provision in both the reformed Civil Code and in the Consumer Code that excludes the balance of the price and main obligation from scrutiny, a limitation not present in the assessment of significant imbalance in the Commercial Code. Indeed article L. 442-6 specifically refers to two prohibited commercial practices that relate to the price or main obligation: seeking an advantage that is manifestly disproportionate “in light of the value of the service rendered” and threatening a break in commercial relations to obtain clearly abusive conditions “concerning prices.” These companion provisions, combined with the absence of textual restriction on the Commercial Code’s assessment of significant imbalance, leave no doubt that article L. 442-6 provides judges with broad discretion to assess significant imbalance regarding any term of a commercial contract. Moreover, unlike article L. 132-1 of the Consumer Code and article 1171 of the reformed Civil Code, article L. 442-6 of the Commercial Code can be enforced by government officials as well as other interested persons.

In sum, principles of freedom of contract still hold a central position in the reformed Civil Code, and indeed have a constitutional dimension in France. Nonetheless, qualifications in the Civil Code’s statement of freedom of contract “suggest a compromise position that supports an express freedom of contract only to the extent that it is ‘controlled.’ ”

C. Assessing Article 1171

When viewed in context, article 1171 comes into focus as part of a natural evolution in French law rather than an aggressive vanguard of a revolution. In the context of the general consumer protection movement in Europe and

clarification: “‘Standard form contract’ translates contrat d’adhésion, more literally ‘a contract to which one adheses’ and whose conclusion therefore involves no or little choice.”

166 C. COM. art. L. 442-6, I 1° (Fr. 2015), translated in Raworth, supra note 38, at 436.
167 C. COM. art. L. 442-6, I 4° (Fr. 2015), translated in Raworth, supra note 38, at 436. Compared to the first example, this one arguably is less telling, or at least less clear, because it refers to abuses not arising from the obligations of purchase and sale. See supra note 162 and accompanying text. Nonetheless, regulation of an oppressively high or low price under subsection 4 appears to be consistent with subsection 2, which more generally regulates a significant imbalance in the main obligations.
168 C. COM. art. L. 442-6, III (Fr. 2015).
169 See supra note 127.
170 Mekki, supra note 46, at 1203.
171 See supra notes 137–39 and accompanying text.
172 Mekki, supra note 46, at 1202.
173 See supra notes 145–46 and accompanying text.
the predecessor statutes in the French Consumer and Commercial Codes, extending the regulation for significant imbalance to a more central position in the Civil Code seems perfectly appropriate. Moreover, article 1171 accomplishes this extension in a cautious manner, restricting its application to auxiliary terms (unlike the Commercial Code) and to adhesion contracts (unlike both the Consumer Code and the Commercial Code).

French judges have not engaged in excesses when exercising their powers under flexible standards, such as those in the Consumer and Commercial Codes, and the relatively restrictive scope of article 1171 invites continued judicial moderation. Although the significant-imbalance standard leaves room for judgment in its application, it is more explicitly descriptive of this policing function than the term "cause" and arguably more objectively precise and descriptive than the term "unconscionability." Moreover, although article 1171 is not expressly tied to administrative lists of potentially unfair clauses, regulations accompanying the Consumer Code can provide general guidance for novel applications of a significant imbalance standard, reducing the risk of surprising judicial applications.

Indeed, one may wonder whether the inclusion of article 1171 in the reformed Civil Code is largely symbolic in light of how much of its work is already performed by the Consumer and Commercial Codes. It could supplement those codes by addressing challenges to ancillary terms in contracts between two nonprofessionals, or by encouraging judges to find significant imbalance in clearly meritorious cases in novel contexts, even in the absence of specific guidance from regulations to which the Consumer Code is tethered. Beyond that, locating the text of article 1171 within the Civil Code could help establish the regulation of significant imbalance as a more central principle of French law, one that helps to moderate its general

174 See supra notes 152–68.
175 See, e.g., Mekki, supra note 46, at 1200–01 (referring to studies on this topic).
176 See supra notes 19–24.
177 See Ghirardelli, supra note 108, at 768–69 (for a "clear definition of unconscionable terms," proposing the significant imbalance standard).
178 See Amaro, supra note 22, at 5, § 2.
179 Prior to the 1993 EU Directive and its implementation in the French Consumer Code, for example, the Cour de cassation famously found a term to be void for unfairness, even though the term did not appear among those few identified by a regulatory agency acting pursuant to the predecessor to article L. 132-1, the Scrivener Law of 10 Jan. 1978. Lorthioir, Minit Foto v. Boucheron, Arrêt du 14 mai 1991, Bulletin des arrêts de la Cass. civ. Ire, no. 153, discussed in Steiner, Comparative Approach, supra note 152.
180 See supra note 46 and accompanying text.
principles of freedom of contract.\textsuperscript{181} Because its reach is modest, it sends that message in a manner that is more evolutionary than revolutionary.\textsuperscript{182}

Indeed, the scope of the provision is arguably modest to a fault. Two features merit separate assessment: the limitation of article 1171 to adhesion contracts and the exclusion of assessment of the price or other compensation for the main obligation.

1. Adhesion Contracts

An early draft of article 1171 applied broadly to any contract, regardless whether negotiated or adhesion in nature, but it also required a challenge based on significant imbalance to be raised by the party seeking relief.\textsuperscript{183} The final version omits the requirement that a challenge be raised by a party, thus permitting the judge to raise an issue of significant imbalance on the judge’s own motion, but it restricted article 1171’s application to adhesion contracts.\textsuperscript{184}

The changes made for the final version are appropriate. Restricting the application to adhesion contracts eases fears that the law will disturb the results of active bargaining between parties,\textsuperscript{185} while in fact excluding very few consumer contracts.\textsuperscript{186} Moreover, permitting judges to act on their own motion greatly reduces the risk that a party will waive a meritorious claim

\textsuperscript{181} See supra note 127 (Civil Code provisions on freedom of contract, with limitations); see also Amaro, supra note 22, at 8, § 16 (referring to those who defend judicial intervention as a check on excesses of freedom of contract).

\textsuperscript{182} See Mekki, supra note 46, at 1194 (“Although the presentation of general principles is somewhat innovative, overall, the project is quite moderate and does not present a revolution of ideas.”).

\textsuperscript{183} Amaro, supra note 22, at 5 (setting forth the French language text of article 77 of the Reform, an early draft of article 1171 of the new Civil Code). In the translation invited by the Ministry of Justice, this early text read: “A contract term which creates a significant imbalance in the rights and obligations of the parties to the contract may be struck out by the court on the request of the party to the contract whose detriment it is stipulated. The assessment of significant imbalance must not concern either the definition of the subject matter of the contract nor the adequacy of the price in relation to the act of performance.” (Translated by Bénédicte Fauvarque-Cosson, Simon Whittaker & John Cartwright).

\textsuperscript{184} See supra note 18 and accompanying text.

\textsuperscript{185} See, e.g., Amaro, supra note 22, at 7, § 10 (criticizing the early draft of art. 1171 for covering even negotiated contracts); Maxeiner, supra note 76, at 160–62 (describing the successful advocacy of German scholars for restricting the 1993 EU Directive to non-negotiated terms, reasoning that the effect on autonomy and freedom of contract is greatly dependent on this factor).

\textsuperscript{186} See supra note 85; see also Maxeiner, supra note 76, at 130–31 (1976 European resolution and explanatory memorandum focused on problems caused by adhesion contracts).
because of ignorance of the law, inability to pay the legal costs of mounting a challenge, or commercial retaliation.187

Nonetheless, judges applying article 1171 will be faced with difficult questions when presented with a standard form contract whose terms were dictated solely by a business, with the exception of a consumer's choice between several printed options on terms unrelated to the issue of significant imbalance. Is that an adhesion contract or one that was subject to negotiation, albeit to a minor degree?

Moreover, the 1993 EU Directive on Unfair Terms in Consumer Contracts showed that a law can nimbly regulate unfair terms that are not subject to negotiation, even if the entire contract is not an adhesion contract: "A contractual term which has not been individually negotiated shall be regarded as unfair..." In the reformed Civil Code, by contrast, negotiations over the price of goods could prevent article 1171 from protecting a party from operation of a draconian auxiliary clause. To strike a sensible middle ground between a statute that applies to both negotiated and adhesion contracts, as do the Consumer and Commercial Codes,189 and the current text of article 1171, a minor revision in article 1171 could mirror the approach taken by the EU Directive: it could regulate any unfair terms that were imposed without possibility of negotiation by a party with greater bargaining power. Such a term would retain article 1171's moderate scope while avoiding embarrassing questions about the minimum level of negotiation that would take an entire contract out of the range of judicial scrutiny under article 1171.

2. Exclusion of Significant Imbalance in the Main Obligation

Both article L. 132-1 of the Consumer Code and article 1171 of the new Civil Code exclude price and main obligation from their coverage, consistent with the 1993 EU Directive on Unfair Terms in Consumer Contracts.190 In contrast, some courts in the United States have applied the unconscionability

187 Amaro, supra note 22, at 8, § 15; see also Maxeiner, supra note 76, at 136, n.163 (with respect to national laws implementing the EU Directive on Unfair Terms in Consumer Contracts, European Court of Justice held that courts must raise challenges to unfair clauses on their own motion, noting that lawyers' fees may be higher than the amount at stake). On the other hand, the new Civil Code somewhat reduces the risk of waiver for these reasons by authorizing approved consumer associations to bring suit on behalf of consumers with regard to events that adversely affect the collective interests of consumers. C. civ. art. L. 421-1 (Fr. rev. 2016).
188 EU Dir. 93/13, supra note 147, art. 3.1.
189 See supra notes 156 (Consumer Code), 162 (Commercial Code).
190 See supra note 151 and accompanying text.
doctrine to consumer contracts in which a trader has extracted a highly inflated price for the main obligation of goods or services, such as one in which a door-to-door salesman persuaded a low-income couple to buy a solar water heater at a highly inflated price.\textsuperscript{191}

One rationale for the more limited scope under articles L. 132-1 and 1171 is the degree to which a party has the opportunity and the ability to assess various kinds of terms dictated by the other party, coupled with legal protection against aggressive sales methods. Ideally, consumers should be aware of the nature of goods or services offered by a professional and the price quoted for them, and they should be able to reject an unattractive offer and take their business to a competitor. The consumer should not worry about negative future consequences stemming from such an action.\textsuperscript{192} Consumers need protection mostly from abusive auxiliary terms to which they might pay little attention or have difficulty assessing the risks.\textsuperscript{193} Although a trader might succeed in extracting an inflated price from a consumer through high-pressure sales tactics, such as the door-to-door sales in illustrative cases from the United States,\textsuperscript{194} European law offers generous withdrawal periods for such contracts as well as other protection from aggressive sales tactics.\textsuperscript{195}

This rationale begs the question why article L. 442-6 of the Commercial Code protects a commercial party to a greater degree, without limitation on the nature of the term that is challenged.\textsuperscript{196} Professor Amaro offers this further explanation: unlike a consumer, a small business might deal regularly with a much larger enterprise that dominates a specialized market, an enterprise on whom the small business depends for supply, sales, or services. In those circumstances, the small business might accept oppressive terms in a negotiated contract to maintain the necessary relationship with the firm that has much greater bargaining power. Small business owners might have a great interest in avoiding such oppressive terms but could fear commercial retaliation if they challenge the terms in court. A broad regulation of

\textsuperscript{192} See supra note 124.
\textsuperscript{193} Amaro, supra note 22, at 6, § 6; Leff, supra note 110, at 350; see also supra note 105.
\textsuperscript{195} See, e.g., Directive on Consumer Rights, supra note 146 (maximum harmonization directive mandating national laws requiring vendors of goods and services to supply designated information, and providing for fourteen-day withdrawal period for consumers in distance or off-premises sales); Directive on Unfair Commercial Practices, supra note 150 (mandating national laws against misleading, aggressive, and harassing commercial practices, and undue influence).
\textsuperscript{196} See supra notes 161, 165–66 and accompanying text.
significant imbalance, even in negotiated contracts, helps to remedy the consequences of commercial dependency. Additionally, government enforcement helps to distance small businesses from assertion of legal positions that might rupture their relations with necessary commercial partners.  

Article 1171’s exclusion of price and main obligation from scrutiny for significant imbalance represents a reasonable compromise between absolute freedom of contract and maximum protection of weaker parties. It does not create a significant gap in coverage, yet it stands out as a declaration of moderation, helping to alleviate fears that article 1171’s appearance in the Civil Code is “frightening” and might drive international traders to prefer other national laws to govern international transactions.

3. A Comparative Assessment of Judicial Power

To explore a final point of comparison between French judicial application of article 1171 and unconscionability analysis in the United States, one can consider the feminist analysis of Adélaïde Remiche, who has critiqued the “imagined judge,” or “the judge as he or she is represented in a specific legal culture.” Remiche characterizes the “imaginary representations” conveyed by French and U.S. legal cultures in the following ways: “The French imagined judge is, in broad terms, a knowledgeable automaton mechanically applying the law entirely created by the Parliament, while his or her American counterpart is a decision maker well equipped to solve social problems.” Further, she believes that stereotyped associations between masculinity and the exercise of power might explain in part why proportionally, France has twice as many female judges than the United States. Perhaps men are not drawn to the seemingly non-powerful role of magistrate in France, explaining why 70% of test-takers for that position are women. Conversely, gendered stereotyping has historically played a role in the proportionately lower appointment of women to the obviously powerful role of judging in the United States.

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197 Amaro, supra note 22, at 6, § 6.
198 See EBA, supra note 16.
199 Remiche, supra note 48, at 96.
200 Id.; see also id. at 99 ("[T]he former is a ‘knowledgeable automaton’ and the latter is a ‘powerful actor.’ ").
201 Id. at 95.
202 Id. at 99–107; see also id. at 108–09 (the gender effect is replicated in other common law and civil law countries); Nikolaus Benke, Women in the Courts: An Old Thorn in Men’s Sides, 3 Mich. J. Gender & L. 195 (1995).
The notion that the French judges do not make law, at least in some limited fashion, is a fiction. French judges at all levels are adding meaning and texture to the Civil Code with every interpretation and application of general legislative text to specific disputes. The French judiciary's participation in lawmaking certainly is not as open and far ranging as the fashioning of common law rules in the United States, nor does it have the force exerted by the legislative interpretation of an appellate court in the United States, which binds lower courts within the relevant jurisdiction under the doctrine of stare decisis. Nonetheless, lower courts and advocates in France do pay heed to previous decisions of appellate courts, not as binding precedent but as persuasive authority, particularly if


204 See, e.g., Chamboredon, supra note 203, at 87 (arguing that this type of judicial participation in refining the law should not be viewed as foreign to the civil law); Dawson, supra note 131, at 399, 416–31 (tracing the debate about the legal force of French jurisprudence); Mitchell Lasser, Judicial Deliberation: A Comparative Analysis of Judicial Transparency and Legitimacy 30–61 (2004); Ugo Mattei, COMPARATIVE LAW & ECONOMICS 84 (1997); Steiner, supra note 46, at 75; Mitchell Lasser, Judicial (Self-)Portraits: Judicial Discourse in the French Legal System, 104 YALE L.J. 1325, 1344–55 (1995) [hereinafter Lasser, Portraits] (discussing modern theory that French judicial decisions create "legal norms" even if they do not amount to an official source of law). Although the Napoleonic Code prohibited judges from deciding cases by issuing general regulations, supra note 48, it also threatened prosecution of judges who refused to adjudicate a matter for lack of specific direction in legislation. C. civ. art. 4 (Fr. 2015).

205 Justice Mosk said of the common law, "The inherent capacity of the common law for growth and change is its most significant feature. It is constantly expanding and developing to keep up with the advancement of civilization and the new conditions and progress of society, and adapting itself to the gradual changes in trade, commerce, arts, inventions, and the needs of the country. . . . The vitality of the common law can flourish if the courts remain alert to their obligation and have the opportunity to change it when reason and equity so demand." Stanley Mosk, The Common Law and the Judicial Decision-Making Process, 11 Harv. J.L. & Pub. Pol'y 35 (1988).

206 Compare Steiner, supra note 46, at 76, 79–82 (no formal system of stare decisis in France), with State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); and Pearson v. Callahan, 555 U.S. 223, 233 (2009) (explaining that stare decisis applies with special force to previous interpretations of statutes, because Congress can correct judicial error).

207 See, e.g., Steiner, supra note 46, at 80–82, 97; Lasser, Portraits, supra note 204, at 1350–51.
The new Civil Code invites a reassessment of the role of the judiciary in France. Judges will continue to refrain from issuing quasi-legislative decrees, and the legislative and executive branches will continue to act as the primary actors in fashioning and reforming laws. In short, political questions will be left to the other branches of government. French judges at all levels, however, have long performed a role that is substantial and challenging. With each application of a general code provision to novel, specific facts, they give life to and shape the law. They add to the law in its interstices, where legislative text requires interpretation, and their case law receives ultimate approval only when codified. However, the reform’s very act of codifying previous case law shows that courts had been participating in the process of filling gaps in the original Code.

The power to apply the significant imbalance standard can safely be entrusted to the French judiciary, as a means of helping to implement the legislative limits to freedom of contract. It provides just enough flexibility to allow the judiciary to shape the law through application to specific types of clauses, thus helping to add certainty to the law, rather than undermining it.

IV. CONCLUSION

The addition of the significant imbalance standard to the Civil Code, along with the power to exclude an unfair term from a contract, will not introduce imbalance into the French legal system. It reflects the modern evolution of controls on freedom of contract and the gradual increase in

208 See, e.g., DAWSON, supra note 131, at 409; STEINER, supra note 46, at 87–88 (discussing the concept of “jurisprudence constante, whereby a particular interpretation or principle is repeated in a series of decisions”).

209 See generally STEINER, supra note 152, at 299 (“Encouraged by scholarly writings, French courts have been able to create a body of substantive rules aimed at providing a greater degree of balance in contractual obligations.”); RENÉ DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY, at xi–xii, xiii–xiv (Michael Kindred trans., 1972) (the persuasive authority of French judicial decisions can grow with academic study and evaluation).

210 See supra notes 133–34; see also Chamboredon, supra note 203, at 95–97 (judicial participating in lawmaking must take place within constraints).

211 See supra note 204.

212 See supra notes 10–12.

213 See supra note 181 and accompanying text.

214 See Chamboredon, supra note 203, at 88 (recommending these qualities for a flexible standard).
judicial intervention\textsuperscript{215} since the distrust of the judiciary in the aftermath of the French Revolution.\textsuperscript{216}

The experience in the United States provides an interesting contrast. Although Americans are more resistant to legislative and administrative regulation than are Europeans,\textsuperscript{217} judges in the United States exercise power more openly and unapologetically.\textsuperscript{218} Nonetheless, with some exceptions the unconscionability doctrine has stalled when the legal and political culture lost enthusiasm for controls on freedom of contract to avoid abuses.\textsuperscript{219}

The time is ripe for more freely and openly acknowledging the appropriate power that the French judiciary exercises in France with integrity, professionalism, and appropriate restraint, so that it can assume its place as a full partner in the battle against abusive contract terms, including in the application of the significant-imbalance standard. At the same time, Americans should more fully embrace the way in which administrative regulations can work in tandem with judicial review of contracts for unfair terms.\textsuperscript{220} As a more specific and authoritative guide than the official comments to the U.C.C., administrative regulations could guide judges in the application of the unconscionability doctrine, providing a basis for making the “attitudinal adjustment”\textsuperscript{221} necessary for robust policing of unconscionable terms and contracts.

\textsuperscript{215} See, e.g., supra note 179.
\textsuperscript{216} See supra notes 131–36.
\textsuperscript{217} See Paul D. Carrington, Unconscionable Lawyers, 19 GA. ST. U. L. REV. 361, 369 (2002) (contrasting the use of regulatory bureaucracies in other developed countries with the preference for private litigation in the U.S. because of Americans’ distrust of government).
\textsuperscript{218} See supra notes 205–06 and accompanying text.
\textsuperscript{219} Compare supra notes 96–99 (retrenchment in unconscionability doctrine and failure of reasonable expectations doctrine), with supra notes 140–68 (tracing European and French laws in the last half century that protect weaker parties in a compromise with freedom of contract); see also Allen R. Kamp, Downtown Code: A History of the Uniform Commercial Code 1949–1954, 49 BUFF. L. REV. 359, 419–24 (2001) (tracing the evolution of the unconscionability provision of the U.C.C., from one that would empower judges to police for fairness, balance, and reasonableness, to the more constrained unconscionability standard, based on concerns about interference with freedom of contract); Jane K. Winn & Mark Webber, Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants, 62 BUS. LAW. 1, 3 (2006) (“[D]uring the 1980s . . . the U.S. embraced more market-oriented approaches that required individuals to bear more risk in consumer transactions, while the EU embarked on a sweeping program of legislation to protect consumers from many of those risks.”); cf. Ziegler, supra note 29, at 397 (criticizing European approach for excessive paternalism and praising more market-based approach in the U.S.).
\textsuperscript{220} See supra notes 108–26 and accompanying text.
\textsuperscript{221} See supra note 122 and accompanying text.